It appears to me, therefore, that the expression *voire dire* has no effect such as has been suggested. The words *voire dire* appear to have been adopted in practice from the early form of oath administered on these occasions in a wide variety of cases, and the only reason for giving the procedure a name appears to be to signify that the court is embarking on an inquiry, which is not necessarily based on any issue between the parties, and may be of the court's own motion.

It seems to me that I am not at liberty to depart from the proper course of a trial simply on the ground that the accused may be in a less favourable position if I do not do so."

With respect, we are unable to accept the views expressed by Mann C.J. It seems to us that fairness to the accused, which is a fundamental principle of the administration of criminal justice, requires that a trial within a trial ought to be considered a separate or collateral proceeding. In the course of a trial within a trial evidence may be given which would be inadmissible evidence on the charge against the accused but may be relevant on the issue to be decided at the trial within a trial. In such a situation it would be grossly unfair to the accused if the true principle is that evidence called at a trial within a trial is before the court for all purposes.

Conversely, in the course of a trial within a trial evidence may be given which may be relevant and admissible evidence on the charge against the accused but would not be relevant on the issue to be decided at the trial within a trial. In such a situation the accused or his counsel might well decline to challenge such evidence in the justifiable belief that it could not adversely affect the accused on the issue to be decided at the trial within a trial.

We are fortified in the opinion we have just expressed having regard to the evidence given by Tan Huan Piaw at the trial within a trial in the present case, his perfunctory cross-examination by the appellant's counsel and the reliance by the trial judges of the admission by the appellant to Tan Huan Piaw that he had in a moment of desperation flung the girl out of the window. If Tan Huan Piaw had related this admission as a prosecution witness at the trial proper it would have been highly improbable, having regard to the appellant's defence, that he would not have been severely cross-examined as to his credibility. The admission was totally irrelevant to the issue which the trial judges had to decide at the trial within a trial.

For all these reasons we were of the opinion at the conclusion of the appeal that the trial was unsatisfactory and that the conviction ought not to be allowed to stand. We ordered a re-trial as we considered that was the proper course to adopt.

Re-trial ordered.

Solicitors: *Tang & Tan.*

A MALAYSIAN REPORTS

THAM KAI YAU & ORS. v. PUBLIC PROSECUTOR

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) October 18, 1976]

[Kuala Lumpur — Federal Court Criminal Appeal No. 13 of 1975]

Criminal Law and Procedure — Murder — Difference between murder and culpable homicide — Necessity to explain difference to jury.

Evidence — Evidence of boy of 14 years — Possessing sufficient intelligence to understand meaning and significance of oath — Whether a child of tender years — Corroboration.

Penal Code, ss. 34, 299, 300 & 302 — Murder — Difference between murder and culpable homicide.

In this case the appellants had been convicted of murder. One of the witnesses called at the trial was the son of the deceased, a student, then aged 13 years and 14 years at the date of the trial. The learned trial judge held that he understood the nature and meaning of the oath and allowed him to give evidence on affirmation. The evidence in the case showed that the appellants attacked the deceased and did intend to cause bodily harm to the deceased. But the distinction between murder and culpable homicide not amounting to murder was not put clearly to the jury in such a way that they would be able to come to a correct conclusion.

Held: (1) in this case the learned judge did not consider the son a child of tender years and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. A warning that it would be dangerous to convict on the uncorroborated evidence of a child of tender years was not necessary in cases involving child evidence and in any case there was in fact substantive corroboration of the boy's evidence in this case;

(2) a case such as the present would fall within the second part of section 299 or the third clause of section 300 of the Penal Code. Speaking generally, if the act must in all probability cause death the offence is murder within section 300 of the Penal Code and if the act is only likely to cause death, the offence falls within section 299 of the Penal Code. In view of the medical evidence in this case the case might not unreasonably have fallen within the lesser offence of culpable homicide not amounting to murder falling within the first part of section 304 of the Penal Code and therefore the conviction for murder must be set aside and a conviction for culpable homicide not amounting to murder substituted for it.

Case referred to:-

(1) *Lee Choon Huat* v. *Public Prosecutor* [1971] 2 M.L.J. 167.

FEDERAL COURT.

Edmund Yong Joon Hong for the appellants.

Abdul Malik bin Mohamed Salleh (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah F.J. (delivering the judgment of the Court): The appellants were charged with murder under section 302, read with section 34, Penal Code and after a trial extending over fifteen days they were convicted on that charge and sentenced to death.

The incident giving rise to this case took place at about 9.00 a.m. on April 9, 1974 at the New Market, in the Old Town of Petaling Jaya. However, two days before that date there was an altercation between the deceased and appellant 1 and his brother who kept a pork stall opposite that of deceased, a pork-seller by profession, resulting in deceased assaulting both of them. A police report was lodged by appel-

lant 1. With that background showing the estranged relationship between deceased and appellant 1 it is alleged by the prosecution that the appellants and probably one other made an attack with choppers and saw on the deceased. The appellants were brothers and worked and lived separately, and a point stressed to us by the prosecution and indeed to the trial court was that on that fatal morning they converged at the same time and at the same place and attacked the deceased inflicting multiple deep incised wounds, two of these being head wounds of a serious nature, thus showing that they were acting in concert in pursuance of a pre-arranged plan. The only witness who speak to the occurrence is PW8, the son of the deceased, a student of La Salle Secondary School, then aged 13 years, and 14 years at the date of trial. He was allowed to give evidence on affirmation as the learned judge held that he understood the nature and meaning of the oath. He said that morning he was assisting his father at the stall. Appellant 1 came and challenged his father to a fight. He knew the appellant as he had seen him before that date in the market at his brother's stall. His father did not accept the challenge; the appellant then went away and returned almost immediately with 3 men (in cross-examination he said 4 men). He identified one of them as appellant 4. He said appellant 1 was armed with a saw and the others were armed with choppers. They slashed his father; PW8 said he saw two blows landed on his father, but could only say one landed on his cheek; the father then ran to the first floor; three of the assailants, one of them being appellant 1, pursued him. He ran out of the market and shouted for help. He then rushed to the first floor. On the way up, he saw the same three men coming downstairs — appellant 1 carrying a saw and the other two carrying choppers. He found his father lying on the floor in a pool of blood. With the help of his aunt, PW9, the deceased was carried downstairs and taken to hospital where he died some 1½ hours later.

PW9, deceased's elder sister who had a vegetable stall in another area of the market testified that she was attracted by the commotion upstairs and by someone shouting to her that her younger brother was attacked. She rushed upstairs. On the landing which separated the first flight of stairs and the second, she saw four persons coming down the stairs. She identified appellant 3 who she said she had seen once before that date, as one of the 4 persons. He was holding a chopper and his clothes were covered with blood. After deceased was sent to hospital, PW9 went to his stall and picked up some money from the floor and stall. She also picked up three choppers — two from the stall and one from the floor. She wrapped them, took them home and later handed them to the police. On the blade of one of the choppers was 9 strands of human head hair and 2 strands of pig hair; on another 6 strands of human head hair and 2 strands of pig hair.

PW11, deceased's brother-in-law, a vegetable-seller at the same market, identified appellant 4 who was then going down the stairs. He said when he heard the commotion had spread to the first floor he rushed upstairs. He saw 3-4 persons going down by the other staircase nearer the pork stalls. They had almost reached the ground floor. He noticed appellant 4 was just about to go down. He was holding a chopper and his clothing was stained with blood.

PW10, a seamstress, living at the same address as appellant 4 at Setapak testified that at about 9.45 a.m. of the fatal day, appellants 1, 2 and 3 came in. She noticed appellant 2 had a severe head wound and appellant 1 had a leg injury. She dressed and bandaged the wounds. Appellants 2 and 3 then left. Appellant 4 returned and later at about 1.00 p.m. both appellants 1 and 4 left the house.

Appellants 1 and 2 went to General Hospital, Kuala Lumpur to get treatment. Both were arrested at about 2.30 p.m. Appellant 3 had a head injury and one on upper part of right arm. He was arrested at 7.16 p.m. Appellant 4 was arrested at 10.00 p.m.

At about 4.00 p.m. on same day appellant 1 led a police party to appellant 4's house where 3 choppers were recovered; one had human blood (insufficient for grouping) and the other two had human blood and human head hairs on the blades, and a saw stained with human blood on the handle. The blade was dented.

It was stressed to us in argument that all these 3 prosecution witnesses were relatives of the deceased, and therefore interested witnesses. PW8 picked out appellants 1 and 4 at an identification parade held 8 days later. No identification parade was held for PW9 and PW11 in respect of appellants 3 and 4.

As to the actual subject-matter of the charge, it cannot be disputed that the deceased was attacked by the appellants and probably one other armed with choppers and saw, at the time and place alleged by the prosecution and he died the same day as a result of the multiple injuries he received. These facts were not controverted by the defence, and in fact they were proved beyond reasonable doubt by PW8, corroborated by PW9 and PW11, and the medical evidence.

The pathologist testified that in his opinion the probable cause of death was multiple injuries leading to shock and haemorrhage. On the question whether the appellants intended to cause such bodily injuries as they knew to be likely to cause death or such as is sufficient in the ordinary course of nature to cause death, the medical witness should have been asked to give his opinion on the nature of the injuries and its likely and natural effects, but in this respect his evidence is silent.

The appeal was brought on several grounds. We did not intend to deal with all of them as we felt there was not much substance in them. We needed to consider only two. One of them was that the jury were not given due warning against accepting the evidence of PW8 who was 13 years of age at the time of the incident and 14 when he gave evidence, without corroboration. In cases involving child evidence of tender years, we are of the opinion that it would not be necessary to give a formal warning that it is dangerous to convict on the uncorroborated evidence of a child of tender years. It is sufficient if the judge adopts the prudent course of advising the jury to pay particular attention to or to scrutinise with special care,

the evidence of young children and explains the tendencies of children to invent and distort. The objection in such a case as this, is not on the grounds of complicity, as in the case of an accomplice, or on the grounds of an oath against an oath, as in the case of a prosecutrix in a sexual offence against her, but on the ground of tendency of a child of tender years to confuse fantasy with reality: see *Loo Chuan Huat* v. *Public Prosecutor*.[1]

In the present case, however, the learned judge did not consider PW8, a child of tender years and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. The absence of such warning therefore was not fatal as there was in fact substantial corroboration of the boy's evidence. The appeal on this ground, we thought, must therefore fail.

A more difficult question that called for decision in this case was the offence of which the appellants should have been convicted. That was the other important ground of appeal, namely, that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted. In amplification of this ground of appeal we feel that it is the proper practice in cases of personal violence resulting in death for the judge to direct the jury on the right issue, in such a case as this, to arrive at a conclusion as to the degree of *mens rea* in the minds of the appellants. It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow. In actual practice however it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.

We therefore intend to deal at some length to emphasise and to discuss the distinctions between the provisions of section 299, Penal Code and section 300, Penal Code.

Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is *likely* to cause death; (c) with the knowledge that ... the act is *likely* to cause death.

Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and ... *is sufficient in the ordinary course of nature* to cause death; (4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of section 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of section 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in section 300, Penal Code is an example. It is on a comparison of these two limbs of section 299 and section 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to section 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder punishable under section 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in section 299 is present, but not the special degrees of *mens rea* referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within section 300, Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall within section 300. The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of section 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part

of section 299, but not within section 300, clauses (2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased. Therefore in those circumstances, the fine distinction between section 299 and section 300 is very important and that point should have been put clearly to the jury in such a way that they would be able to come to a correct conclusion. The forensic practice of reading section 299 and section 300 to juries is likely to confuse rather than help. In view of what we have stated above, a case such as the present must therefore fall within the second part of section 299 or the third clause of section 300. Speaking generally, if the act must in all probability cause death, the offence is within section 300, Penal Code, and if the act is only likely to cause death, the offence falls within section 299, Penal Code. None of the exceptions to section 300, Penal Code were established. In ordinary circumstances we should probably have had little difficulty in upholding the convictions of the appellants for murder but in view of the nature of the medical evidence which we have touched on earlier, we felt the case might not unreasonably be brought within the lesser offence of culpable homicide not amounting to murder, falling within the first part of section 304, Penal Code. We have thought it necessary to deal with this matter at some length to ensure if possible that our finding shall not be construed as a declaration that in all cases such as the present the offence is culpable homicide not amounting to murder.

We set aside the convictions for murder, and substitute them with one under the first part of section 304, Penal Code read with section 34, Penal Code and sentenced each of the appellant to 10 years' imprisonment effective from their dates of arrest.

Order accordingly.

Solicitors: *Dato' S.M. Yong & Co.*

YAP CHENG KEE & ANOR. v. OW GIAM ENG & ANOR.

[F.C. (Ali Ag. L.P., Ong Hock Sim and Raja Azlan Shah F.JJ.) January 31, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 144 of 1975]

Landlord and Tenant — Claim for possession — Statutory tenant — Whether father of appellants statutory tenant or contractual tenant — Admission by counsel — Rent and Charged Land (Restriction) Enactment, 1940, ss. 3 and 7.

Practice and procedure — Admission by counsel — Whether question could be argued on appeal.

The respondent claimed possession of certain premises from the appellants. The premises had been let to the father of the appellants who had since died and the question was whether the father was a contractual tenant or a statutory tenant. An application had been made under the Rent and Charged Land (Restriction) Enactment, 1940, for permission to take proceedings to eject the father but this had been dismissed. The learned Magistrate held that this made the father a statutory tenant and as this point was admitted by counsel for the appellants, the learned Magistrate gave judgment for the respondents. This decision was upheld on appeal to the High Court. The appellants appealed to the Federal Court.

Held, allowing the appeal: (1) the question of whether the deceased was a statutory tenant could be decided on the appeal, even though counsel had made an erroneous admission;

(2) as the landlord's application under the Rent and Charged Land (Restriction) Enactment had been dismissed, the contractual tenancy remained undisturbed and the learned Magistrate was therefore wrong in holding that the deceased had become a statutory tenant;

(3) the appellants as legal representatives and as children residing with the deceased at the time of his death were clearly in law entitled to tenancy of the premises.

Case referred to:-

(1) *Naharani Beni Pershad Koeri* v. *Dudh Nath Roy et al* (1899) 26 I.A. 216, 221.

FEDERAL COURT.

E. Joseph Jr. for the appellants.

Atma Singh Gill for the respondents.

Ali Ag. L.P. (delivering the judgment of the Court): This is an appeal from the decision of the High Court at Seremban, upholding the order of the Magistrate Seremban for eviction of the appellants in respect of premises No. 11, Main Road, Bahau.

It was contended that the appellants are not entitled to the tenancy of the premises as their father, now deceased, was only a statutory tenant. It is not understood what is implied by the notation "Both Counsel making admission on pleadings and not calling witnesses" when there clearly is an issue raised thereon. We refer to paragraph 3 of the Statement of Claim which we now set out: —

"3. The said Yap Boot alias Yap Eng Kee (deceased) (hereinafter referred to as 'the said deceased') by virtue of an application No. 15 of 1947 made to the then Rent Assessment Board, Kuala Pilah, brought by the plaintiffs' predecessors in title, for eviction which was heard and dismissed on December 19, 1947 by the said Board, the said deceased became a Statutory Tenant."

We also refer to paragraph 3 of the defence which reads: —

"3. The defendants have no knowledge of the contents of paragraph 3 of the Statement of Claim and put the plaintiffs to strict proof of the contents thereof."